

1  
IN THE UNITED STATES DISTRICT COURT  
2  
FOR THE DISTRICT OF NEBRASKA3  
UNITED STATES OF AMERICA, )  
4  
Plaintiff, ) 8:13CR105  
5  
vs. )  
6  
TIMOTHY DEFOGGI, ) Omaha, Nebraska  
7  
Defendant. ) January 5, 20158  
TRANSCRIPT OF SENTENCING PROCEEDINGS  
9  
BEFORE THE HONORABLE LAURIE SMITH CAMP  
10  
CHIEF UNITED STATES DISTRICT JUDGE11  
A-P-P-E-A-R-A-N-C-E-S12  
FOR THE PLAINTIFF: Mr. Michael P. Norris  
13  
Asst. United States Attorney  
1620 Dodge Street  
Suite 1400  
Omaha, NE 6810214  
Mr. Keith A. Becker  
Ms. Sarah Chang  
DOJ Trial Attorneys  
1400 New York Avenue, N.W.  
Sixth Floor  
Washington, DC 2053015  
FOR THE DEFENDANT: Mr. Stuart J. Dornan  
16  
Dornan, Lustgarten Law Firm  
1403 Farnam Street  
Suite 232  
Omaha, NE 6810217  
COURT REPORTER: Ms. Brenda L. Fauber, RDR, CRR  
18  
111 South 18th Plaza  
19  
Suite 3122  
20  
Omaha, NE 68102  
21  
(402) 661-732222  
Proceedings recorded by mechanical stenography, transcript  
23  
produced with computer.

1 (At 2:35 p.m. on January 5, 2015, with counsel for the  
2 parties and the defendant present, the following proceedings  
3 were had:)

4 THE COURT: We are here in the matter of the United  
5 States versus Timothy DeFoggi, Case Number 8:13CR105.

6 Will counsel please enter their appearances.

7 MR. BECKER: Keith Becker for the United States, your  
8 Honor.

9 MR. NORRIS: Michael Norris for the United States.

10 THE COURT: Good afternoon.

11 MS. CHANG: Sarah Chang for the United States, your  
12 Honor.

16 MS. CHANG: Thank you, your Honor.

17 MR. DORNAN: Good afternoon, your Honor; Stu Dornan  
18 on behalf of Mr. DeFoggi.

19 THE COURT: Very good. Good afternoon to both of  
20 you.

21 The matter we're addressing is the sentencing.

22 After a jury trial on Counts I through VII of the  
23 indictment, the defendant was found guilty of those counts.

24 And a motion was filed to dismiss Counts II and III as  
25 lesser included offenses, and those counts have been dismissed

1 by the Court's order of December 30, 2014.

2 Mr. Becker, shall I address you as opposed to both of  
3 you? Mr. Norris is nodding.

4 Mr. Becker, did you receive the revised presentence  
5 investigation report in this case and the Court's tentative  
6 findings?

7 MR. BECKER: I did, your Honor.

8 THE COURT: Very good.

9 Mr. Dornan, did you receive those documents and discuss  
10 them with your client?

11 MR. DORNAN: I did, your Honor.

12 THE COURT: The defendant's objections appear at  
13 filing 267. One of the objections had to do with Counts II  
14 and III being lesser included offenses, and so that issue is  
15 now moot.

16 The other objections largely relate to the defendant's  
17 assertion of his innocence. And he takes issue with the  
18 government's version of the offense that is set out in the  
19 presentence investigation report.

20 Those objections are denied. The defendant's motion for  
21 variance appears at filing number 269.

22 And generally as most of the lawyers know, perhaps not  
23 Mr. Becker because he doesn't appear here as often, but I  
24 generally, for the record, deny a motion for a variance,  
25 recognizing that the guidelines are advisory, recognizing that

1 I can sentence outside the guideline range, considering all  
2 the statutory sentencing factors -- and in fact, I may have an  
3 obligation to if those factors indicate that I should.

4 Of course, I am bound by the statutory mandatory minimum.

5 So Mr. Dornan, do you want a separate argument on the  
6 motion for variance that appears at 269 -- it's actually  
7 titled Sentencing Memorandum -- or is it agreeable to you if  
8 those arguments are consolidated with allocution?

9 MR. DORNAN: I would prefer the second way and have  
10 it consolidated, Judge. Thank you.

11 THE COURT: Very good.

12 Then, because the Sentencing Memorandum was actually  
13 filed as a pending motion -- at least it has a gavel next to  
14 it which means I have to take some action on it -- I will deny  
15 it for the record, but keeping an open mind as to what is the  
16 appropriate sentence in this case, considering all the  
17 statutory sentencing factors.

18 Mr. Becker, did you receive the sentencing recommendation  
19 in this case?

20 MR. BECKER: Yes, your Honor.

21 THE COURT: And Mr. Dornan, did you also receive the  
22 sentencing recommendation and discuss it with your client?

23 MR. DORNAN: I did, your Honor.

24 THE COURT: I will go through the advisory  
25 guidelines.

1           And then I do understand, Mr. Dornan, that you may have  
2 some documents that you want me to receive and consider as  
3 exhibits. And I will make sure that you have an opportunity  
4 to address that.

5           MR. DORNAN: Thank you, Judge. There are three short  
6 documents, which I have provided to counsel.

7           THE COURT: Okay. Very good.

8           I'll go through the advisory guidelines. The base  
9 offense level under Section 2G2.6(a) is level 35. There's an  
10 upward adjustment of four levels because of the age of the  
11 victims involved in the pornographic material. There's an  
12 upward adjustment of two levels because of the use of the  
13 computers, which brings us to an adjusted offense level of 41.

14           The defendant's criminal history category is category I.

15           The range of imprisonment under the guidelines on Count I  
16 is 324 months to 405 months, with a 20-year statutory  
17 mandatory minimum.

18           As noted, Counts II and III have been dismissed.

19           On Counts IV through VII, the statutory maximum is 20  
20 years, and that is also the guideline. The supervised release  
21 range for all counts is five years to life.

22           The fine range is 25,000 to \$250,000. And the special  
23 assessment now totals \$500 because there are only the five  
24 counts remaining.

25           And I do note, for the record, that the counts are

1 grouped pursuant to Guideline Section 3D1.2(d) .

2                   The parties have indicated they've received the  
3 sentencing recommendation. The recommendation is for a  
4 sentence of 324 months on Count I and 240 months concurrent on  
5 Counts IV through VII, to be followed by a term of supervised  
6 release that would be a lifetime term.

7                   The imposition of a fine is not recommended because the  
8 defendant at this stage is unable to pay a fine and is not  
9 expected to become able to pay a fine. And as noted, the  
10 special assessment now totals \$500.

11                   So we will proceed to allocution.

12                   And at that juncture, Mr. Dornan, of course, you go  
13 first. And if you wish me to consider some other documents --  
14 I will note that I have reviewed and considered those which  
15 were already sent to me and which appear in the filing in this  
16 case.

17                   You may proceed.

18                   MR. DORNAN: Thank you, Judge.

19                   I have presented to your courtroom deputy an item marked  
20 as Exhibit 10, which is an Evidence Recovery Log that's dated  
21 April the 9th, 2013, that I'd like to offer.

22                   THE COURT: As you may recall, we start defense  
23 exhibits at number 100 generally. And I don't recall where  
24 the exhibit numbers left off at the time of the trial.

25                   Mr. Dornan, was there a reason that you started with

1 number 10?

2 MR. DORNAN: Yes. When we were compiling these  
3 exhibit lists, my paralegal did speak with the court  
4 reporter with respect to -- or somebody in your office.

5 THE COURT: Well, this is not a big deal. We just  
6 want to make sure that -- for purposes of the record that the  
7 appellate court gets the exhibits in an orderly manner.

8 So let me check with Ms. Frahm about what the last  
9 exhibit number was for the defense. And I realize,  
10 Mr. Dornan, you were not counsel of record at the time of  
11 trial. This is not a criticism at all.

12 COURTROOM DEPUTY: One moment, Judge. The next  
13 number should be 307.

14 THE COURT: All right. Mr. Dornan, would you have  
15 any objection to me relabeling these exhibits as 307, 308 and  
16 309?

17 MR. DORNAN: No, your Honor.

18 THE COURT: I'm going to ask Ms. Frahm to do that,  
19 and that will help make sure we don't have two exhibits in the  
20 record that have the same number and could potentially cause  
21 confusion.

22 MR. DORNAN: Thank you, your Honor.

23 THE COURT: All right.

24 What has been titled Evidence Recovery Log is now labeled  
25 Exhibit 307. What is entitled Federal Bureau of Investigation

1 appearing as a report dated April 9, 2013, is labeled 308.

2 And what appears to be the handwritten statement that begins  
3 with the word "overview" is labeled Exhibit 309.

4 And Mr. Dornan, I guess my first question about these  
5 exhibits -- I understand you're offering them at this  
6 juncture. And my question is, are these exhibits relevant to  
7 sentencing, or are these exhibits that the defendant wanted to  
8 have considered at the time of trial in connection with the  
9 issue of guilt?

10 MR. DORNAN: The second -- the latter, your Honor.  
11 These are -- I did not provide these as part of my sentencing  
12 presentation. These are something that Mr. DeFoggi believes  
13 are relevant for the Court to consider.

14 THE COURT: All right. Any objection to Exhibits  
15 307, 308 and 309?

16 MR. BECKER: No, your Honor.

17 THE COURT: All right. I will receive them for the  
18 record, recognizing that the jury found the defendant guilty  
19 beyond a reasonable doubt on all counts.

20 And you can explain to me what, if any, relevance these  
21 may have for the purpose of sentencing. But they will be a  
22 part of the record.

23 MR. DORNAN: Thank you, your Honor.

24 THE COURT: You may proceed.

25 MR. DORNAN: Your Honor, I would -- first, in my

1 Sentencing Memorandum, I've asked the Court to consider  
2 finding the statute -- the child exploitation enterprise --  
3 unconstitutional in this case based on the offense that  
4 Mr. DeFoggi was convicted of and the punishment being grossly  
5 disproportionate to what he was actually convicted of.

6 I know this Court is well aware of the continuum in  
7 Chapter 110 concerning offenses involving child pornography  
8 and child exploitation.

9 If you take a look at the beginning of the continuum,  
10 Judge, it's "access with intent to view" as being the least  
11 serious. And then you go to "possession", then you go to  
12 "receipt", then you go to "distribution", then you go to  
13 "production", then you go to "hands-on offenses".

14 Some of the hands-on offenses and sexual abuse penalties  
15 are less than what Mr. DeFoggi faces here with respect to the  
16 minimum 20 years. And I would argue that the position of  
17 Mr. DeFoggi under the guidelines is just -- basically amounts  
18 to cruel and unusual punishment, concerning that whole  
19 statutory scheme.

20 The other defendants in this matter -- I think most of  
21 them have been sentenced, Judge, and I think most of them were  
22 sentenced by Judge Bataillon. Maybe all of them were  
23 sentenced by Judge Bataillon.

24 Mr. McGrath, who is the person who was responsible for  
25 operating and administering the PedoBook website, received a

1 20-year sentence of imprisonment.

2 Mr. McMillan, who this Court heard as a witness, if you  
3 will recall, received a 12-year sentence of imprisonment. And  
4 if you'll recall, Judge, the fantasy chat attributed to him  
5 was more egregious than the fantasy chat attributed to  
6 Mr. DeFoggi.

7 Anything I say here, Judge, just so Mr. DeFoggi is aware,  
8 he stands on his plea of not guilty. And I'm not admitting  
9 anything in that regards that he admits anything in this, just  
10 so he's aware of that, for purposes of sentencing.

11 The other defendants, Judge, Jason Flanary received 20  
12 years; Zackary Austin, 16 years; Wesley Cameron, 15 years.  
13 They, of course, pled -- Flanary, Austin and Cameron pled to a  
14 lesser offense of conspiracy to distribute.

15 So your Honor, you have a situation where a individual,  
16 who has no past criminal history whatsoever, whose prior track  
17 record is of significant assistance, not only to his country  
18 through the military, to the United States government, but  
19 also to his community of very fine, long-standing  
20 contributions and benefits with respect to his roles as a --  
21 both in the state system and at the highest level of the  
22 federal government.

23 I think all of those things, Judge, at the age of 56, and  
24 the fact that he has not been convicted of anything else, are  
25 very important factors with respect to the Court constructing

1 and fashioning an appropriate sentence.

2 He's 56 years of age. Whatever sentence the Court  
3 imposes here is going to -- if the Court imposed a mandatory  
4 minimum, it's going to place him outside of society for a  
5 significant period of time, and perhaps for the rest of his  
6 natural life.

7 All of those things, Judge, I think are very important,  
8 again not sentencing him to something more than the lower end  
9 of the continuum.

10 I realize that what is attributed to him is -- certainly  
11 is -- would be considered vile and provocative. But it was --  
12 it was in the context of a fantasy chat. And I think it's  
13 very important for the Court to sentence him in accordance  
14 with the "access with intent to view".

15 As I mentioned, Judge, in my Sentencing Memorandum, he  
16 was not part of operating, administering, or controlling this  
17 website. He did not enforce any rules on PedoBook. He did  
18 not accept any users into PedoBook.

19 He did not contribute any child pornography into  
20 PedoBook, did not post any formal notices seeking child  
21 pornography on PedoBook, did not distribute any child  
22 pornography, did not initiate polls in PedoBook, did not  
23 create tag clouds, did not have possession of child  
24 pornography images from PedoBook, and very importantly did not  
25 financially benefit from PedoBook or otherwise from child

1 pornography.

2 You have a number of exhibits which show that he has very  
3 good family support, family ties to the community. He's not  
4 in need of educational or vocational rehabilitation, Judge.

5 I've set forth a number of instances in your sister --  
6 not sister, your fellow judges here in this court relating to  
7 their problems with the excessive nature of the child  
8 pornography guidelines. I reference Judge Bataillon, Judge  
9 Gerrard, Judge Bennett in the North District of Iowa, where  
10 they have found that the child pornography guidelines should  
11 be deconstructed, that they're not representative of empirical  
12 data from the Sentencing Commission.

13 For all those reasons, Judge, I would respectfully ask  
14 the Court to consider the child exploitation enterprise  
15 statutes unconstitutional and sentencing Mr. DeFoggi to below  
16 the mandatory minimum.

17 In the alternative, Judge, if the Court chooses not to do  
18 that, to sentence him to the mandatory minimum of 20, and run  
19 any other sentences concurrent.

20 THE COURT: Thank you, Mr. Dornan.

21 Mr. DeFoggi, is there anything that you would like to say  
22 today in connection with the sentencing?

23 THE DEFENDANT: Yes, there is.

24 I wanted to comment on the PSI first off. And you have  
25 the letter from my previous attorney where the content was

1                   from my son's computer, and the search -- or the exhibits that  
2                   Mr. Dornan gave you. The thumb drive in question is also in  
3                   the PSI, it was found in my son's room.

4                   You also have the statement given to [sic] my son at the  
5                   time he was interviewed by the FBI where he states that the  
6                   eMachine, that nickname Scooter in the PSI, is also his. And  
7                   I think that adds volumes of information that's not relevant  
8                   to my PSI, all of that coming from my son's computer and his  
9                   thumb drive. So I just wanted to point that out to your  
10                   Honor.

11                   Then I wanted to give you the -- I'm sorry. I want to  
12                   give you the other side, the part of me you didn't hear in  
13                   court.

14                   I know you had three days of testimony which made me look  
15                   like I don't know what. And I wanted to testify on the actual  
16                   allegations in this case, but my former attorney told me it  
17                   wasn't a good idea, so I wasn't allowed to do it.

18                   And I did to want highlight -- I had written out another  
19                   letter to your Honor that -- and I'll just read parts of it,  
20                   okay?

21                   THE COURT: Be sure you read slowly. Sometimes  
22                   people read faster than they talk extemporaneously so just  
23                   take it slowly so we can make a record.

24                   THE DEFENDANT: The first part, as I said, I wanted  
25                   you to see the real me, the real side of me that you didn't

1 get to see in court.

2 As Mr. Dornan said, I've spent probably 20 years working  
3 for the government and in the military, serving my country, as  
4 a former federal law enforcement agent, as an innovator of  
5 technology for the intelligence community, the IN, NSA, and as  
6 director of cyber security for a federal agency. And that was  
7 in my blood. I loved every part of it.

8 And you know that Snowden and WikiLeaks certainly used  
9 Tor to exfiltrate classified data out of government networks.  
10 And that was my passion, to defeat Tor as part of my job.

11 I also wanted to take -- I'm sure you've read the letter  
12 I wrote you originally, but I want to tell you how important  
13 my family is to me, and my --

14 I want to address my Christian background, because I was  
15 portrayed as certainly not being Christian at all in this  
16 trial. And I wanted badly to address who I really am and  
17 address the charges, but that never materialized.

18 But my childhood, I was saved back when I was around 6,  
19 attended church regularly. But then in adulthood, I was kind  
20 of irregular church attendance and not much in the way for  
21 prayer life.

22 I'm kind of in -- I'm thankful actually that this  
23 happened, that this got my attention. My life was mostly work  
24 and my family. And I never gave God -- I didn't give him much  
25 time. I went to church once a month maybe, and I never gave

1 him the time he deserved.

2 So when I got arrested and I prayed about it, I felt  
3 pretty guilty that I didn't go to him any other time until I  
4 needed him. So that's something I've had to contend with.

5 I lost my mother while I was in jail; didn't get to see  
6 her, didn't get to go to her funeral. She was all I had in my  
7 family pretty much, never grew up with my father.

8 Since being moved to Douglas County, I've been in the God  
9 Mod the entire time. Before that, I was in Saunders and Cass.  
10 I read every -- I read the Bible from cover to cover. I've  
11 read a Bible encyclopedia, everything I can get my hands on,  
12 which I'm so thankful that -- if I had been out, I never would  
13 have taken the opportunity to do any of that. Now in the God  
14 Mod over the last four months, I'm so much closer to God than  
15 I've ever been in my life. And I'm sorry I didn't do that  
16 before.

17 I just wanted you to know the real side of me that didn't  
18 get presented at trial. And I ask that you consider that,  
19 consider my career, what I've done, and why I was doing it,  
20 and the person that I really am.

21 That's what I wanted to tell you, your Honor.

22 | THE COURT: Thank you, Mr. DeFoggi.

23 Mr. Becker?

24 MR. BECKER: Thank you, your Honor.

25 THE COURT: I did receive the government's memorandum

1                   regarding sentencing.

2                   MR. BECKER:   Indeed, your Honor, and I'll try not to  
3                   be repetitive of that, knowing that the Court has received and  
4                   reviewed that.

5                   As the Court is well aware, the PedoBook was itself a  
6                   social networking site for pedophiles and child pornographers.  
7                   It was an intensive organization with a massive and global  
8                   membership; thousands of users and members, thousands -- tens  
9                   of thousands of images of children, hundreds or thousands of  
10                  children were exploited through this site and by its users and  
11                  members.

12                  I think it's important, and I think the Court will  
13                  recognize and should recognize the unique and serious danger  
14                  that organized child pornography communities like PedoBook  
15                  pose to children, not only in the United States, but all  
16                  throughout this world; and that that problem, that danger is  
17                  something that is unique and particular to these sorts of  
18                  communities and one that this Court should be very greatly  
19                  concerned about.

20                  That is, of course, a danger that, one, Congress has  
21                  recognized certainly in setting tiers of punishments for  
22                  different types of offenses, different types of child  
23                  pornography offenses.  It's one of the reasons why the child  
24                  pornography enterprise statute carries the 20-year mandatory  
25                  minimum that it does as distinguished from other particular

1 statutes.

2           But, as we've pointed out in our sentencing paperwork as  
3 well, that is also a concern in reality that the Sentencing  
4 Commission has recognized. And while I understand that the  
5 defense wishes that this Court would view this sort of case in  
6 light of an ordinary, passive child pornography recipient type  
7 of case where there may be more argument to be made about the  
8 current sentencing guidelines and whether they focus on the  
9 right factors, the fact is that the Commission in its study,  
10 as we pointed out, was very, very clear about the particular  
11 dangers of organized child pornography communities.

12           I'll just quote it briefly, in the Commission's report on  
13 the guidelines: Child pornography offenders who are involved  
14 with others in Internet-based child pornography communities  
15 normalize and validate sexual exploitation of children,  
16 promote the market for child pornography, and may directly or  
17 indirectly encourage others to produce new images of child  
18 pornography.

19           When these sorts of offenders are able to find these  
20 communities, become members of them, share their particular  
21 desires for particular types of child pornography, to  
22 encourage others to create new child pornography, because when  
23 they network like this, they've already collected everything  
24 that's out there. And what they want is to find new or more  
25 violent and more particular child pornography.

1           And we saw exactly that sort of behavior in the  
2 defendant's conduct on the PedoBook website. That creates a  
3 whole new scheme of danger to children beyond the more sort of  
4 passive collection that I think the defense wishes to paint  
5 Mr. DeFoggi's conduct under.

6           It's a meaningful distinction. And then even in its  
7 conclusions, the Sentencing Commission in one of the, as they  
8 called it, primary factors that should be considered in  
9 imposing sentences were the child pornography guidelines to be  
10 amended, is the degree of an offender's engagement with other  
11 offenders, in particular in an Internet community devoted to  
12 child pornography and child exploitation.

13           And that is exactly the sort of conduct that we are  
14 dealing with in this particular case, and exactly the sort of  
15 conduct that Mr. DeFoggi engaged in and why he's here facing  
16 sentencing today.

17           He, individually, had a choice in how he wanted to  
18 interact with his fellow members of the PedoBook website. As  
19 the Court heard in trial testimony, it was possible to  
20 interact with this site passively. He could have gone there  
21 as a purely anonymous user, never registered a screen name,  
22 never created a persona, never engaged with any user. And he  
23 could have done that and browsed some of the child pornography  
24 on that site entirely passively.

25           He chose not to. The choice that he made was to be an

1 active participant, to make himself a member, to create  
2 himself a persona, to interact with others, to solicit -- and  
3 I think the defense in their papers I think really just much  
4 too narrowly tries to define what it means to solicit in a  
5 notice or advertisement under the child pornography  
6 advertising statute.

7 The fact is, by reaching out to other users looking for  
8 particular types of child pornography, that is a solicitation.  
9 And it's just the sort of solicitation that that statute,  
10 which carries a 15-year mandatory minimum, criminalizes; that  
11 is, looking to others for particular types of child  
12 pornography that can then be shared. And that is absolutely  
13 one of the things that he did on this site.

14 And of course, the Court has seen both in the presentence  
15 report and heard and seen during trial the particular topics  
16 that the defendant discussed in his private messages with  
17 other users, exposing and explaining his particular interest  
18 in the violent sexual abuse of very young children.

19 And frankly, I think the defense wants, of course, to  
20 paint that simply as fantasy chat. And I just don't think it  
21 holds. And that's because of the particular environment where  
22 he was acting in. Because of, in part, the anonymity that the  
23 Tor network provided and that the PedoBook platform operating  
24 on the Tor network provided, and because of the normalization  
25 effect that happens when these sorts of offenders interact

1 with other like-minded people who share those same desires,  
2 what you get in those chats and those private communications  
3 are, in fact, the true desires, the unvarnished desires, where  
4 he is free and able to express exactly what it is that he is  
5 interested in and wants to do because he knows he's anonymous,  
6 he knows or believes that he can't be caught, that his actual  
7 identity can't be found out.

8 And so this Court, I think, should be more concerned  
9 about the content of those chats from the perspective of is  
10 Mr. DeFoggi a danger to children and how does that play into  
11 the sentencing factors in this case.

12 And so whereas they wish to paint that as fantasy, I  
13 think this Court, because of the particular context, can see  
14 it as a troubling statement of actual desires.

15 There's no question the defendant has had a long career  
16 in public service and in working for the federal government.  
17 It is unfortunate that the skill set that he developed through  
18 the government, through his government work, and through the  
19 training that he was provided and the experience that he  
20 gained, also made it possible for him to take the sort of  
21 steps that he did to make it difficult for him to be caught.

22 You know, all of the skills he developed as a government  
23 IT professional, as a security professional, or however you  
24 want to describe his experience, the fact is he used it to  
25 promote his illegal behavior. He used that experience to --

1 used that knowledge to find a site on the Tor network. He  
2 used that experience to set up his computer in a way that he  
3 would be able to -- at least certainly he thought -- erase the  
4 activity that -- erase the evidence of the sorts of activities  
5 that he was engaging in online, to keep those sorts of  
6 activities secret from those closest to him even within his  
7 own household, which he did, we know, for quite some period of  
8 time.

9 And so certainly the Court will take that sort of -- that  
10 service and that experience into account. But it's equally as  
11 probative to see how he used it and, in fact, how he used it  
12 to promote his illegal activity in this particular case.

13 The use of the Tor network, I think, in this particular  
14 context is also -- it's important. It's something the Court  
15 should take into consideration as a part of the nature and  
16 circumstances of the offense here.

17 There's no question there are a multitude of proper,  
18 legal, important uses of anonymity services like Tor. And  
19 there are plenty of legal use for it. It's certainly -- it's  
20 unfortunate, and I think a very dangerous proposition, that it  
21 is adopted as it is in this sort of context, not only for  
22 criminal activity but for activity that involved child  
23 exploitation.

24 Your Honor has seen certainly the evidence of the  
25 thousands of members and users of these sites, the vast

1 majority of whom go unidentified and go unprosecuted because  
2 of the technology that is available and mobilized by them.

3 And so that should be of a great concern and I think it  
4 plays into the 3553 factors in terms of general deterrence;  
5 that it is important for this Court, from the government's  
6 view, to make a strong statement about inappropriate, illicit  
7 use of these sorts of anonymizing services because of the  
8 danger that it presents to children where this sort of  
9 activity in exploiting children can be done openly and  
10 notoriously without fear of detection by law enforcement.  
11 That presents a great danger to children, makes them much more  
12 vulnerable to abuse and to new abuse; make the offenders who  
13 are involved in this more willing to share new images of child  
14 pornography because they believe that they can hide behind  
15 these sorts of anonymous services.

16 So again, as we look at arguments against the current  
17 framework of the Sentencing Guidelines and possibly an  
18 amendment to them at some point down the road, they need to be  
19 replaced with something. They're not going to be simply  
20 thrown away. They're going to be replaced with factors that  
21 are probative, that remain probative. As the Commission has  
22 already said, one of those factors should be the degree of  
23 interaction with an online community like this one.

24 And certainly, we would contend that another of those  
25 factors would be the use of anonymization services by

1 defendants to exploit children. So we'd ask the Court to  
2 consider that as well.

3 In terms of a couple of the defendant's, I think, legal  
4 objections, I'll just address them briefly.

5 First, in terms of the child exploitation enterprise  
6 statute, the statute itself makes no distinction among or  
7 between the violations of Chapter 110 that may form predicates  
8 for a violation of the statute.

9 So 2252(g) [sic] states that the three offenses must be  
10 violations of Chapter 110. And it doesn't subdivide, it  
11 doesn't categorize, it doesn't say they have to be serious  
12 violations or significant violations or only some violations  
13 and not others. The statute itself doesn't make those sorts  
14 of distinctions.

15 And so I don't believe that it's relevant, for the  
16 Court's analysis here, to choose between, well, wouldn't it be  
17 worse -- or a worse violation of 2252(g) if it were three  
18 production offenses as opposed to three access with intent to  
19 view. The statute doesn't make that distinction and that's  
20 the choice that Congress made when drafting that statute.

21 Whether the access with intent to view child pornography  
22 is more or less serious than other child pornography statutes,  
23 one, I don't think is relevant to the legal analysis here; but  
24 two, I know that it's not relevant to the children that are  
25 victimized. And that is something the Court should definitely

1       take into consideration when addressing the defendant's  
2       argument there.

3           The child victim -- to the child victim, the child who  
4       has been exploited, who has been abused, whose images have  
5       been accessed, trafficked, distributed, received, whatever  
6       action word we put in front of it, that child has been  
7       victimized and it is that child's victimization that Congress  
8       is taking account of when putting together these statutes and  
9       that statutory regime.

10          And so we can say, well, one statute is more serious  
11       because the mandatory penalty or the maximum penalty is  
12       higher. But we can also say they are all of equal seriousness  
13       because they all deal with a child who has been abused and  
14       victimized and about accounting for that victimization.

15          And of course, the enterprise statute accounts for a  
16       particular type of victimization; that is, one that is done in  
17       concert with others and one that involves repeated felony  
18       violations of Chapter 110. And there's just no question that  
19       those repeated violations were proven in this case and that  
20       the defendant engaged in that activity with his many other  
21       co-conspirators on the PedoBook website.

22          In terms of the other defendants in this case and looking  
23       at the other prosecutions here in this district, a couple of  
24       important points:

25           First, there were offenders who are charged in this

1 district who accessed PedoBook anonymously, without  
2 registering a user name or a screen name. They are not  
3 charged with enterprise, they're charged with receipt and  
4 attempted receipt, with access with intent to view child  
5 pornography, because they interacted with that site  
6 differently than Mr. DeFoggi did.

7 And so there is a distinction to be drawn between the  
8 sort of activity someone engaged in on these sites. And it's  
9 been drawn and it's been drawn in this district in the context  
10 of other cases of users who accessed the PedoBook website.

11           Other defendants the defense has referenced -- I know  
12           we've put together a chart to try to lay out the  
13           distinguishments between other defendants who used PedoBook,  
14           who were members of PedoBook, and Mr. DeFoggi.

15                   But to be clear, Aaron McGrath, the administrator of this  
16 site, as well as others, one, of course, pled guilty; two,  
17 cooperated with the government and received credit for that  
18 cooperation. So his 20-year sentence occurred only after  
19 those two factors were taken into account. And as I noted for  
20 the Court, the government requested a sentence of 30 years in  
21 that case.

With respect to Jason Flanary, pled guilty to child  
exploitation enterprise, not to any lesser count. And he was  
the first to plead guilty and received a 20-year sentence, the  
mandatory minimum in that case, again after accepting

1 responsibility.

2 Cameron, who was another member of PedoBook, pled guilty  
3 to conspiracy to advertise child pornography. He did --  
4 although he didn't receive 5K credit, he did make attempts to  
5 cooperate with the government, obviously took responsibility  
6 and received credit for that acceptance of responsibility.

7 Zachary Austin, who was the defendant's codefendant,  
8 although he did plead guilty to conspiracy to distribute,  
9 because of a prior conviction, the mandatory minimum for his  
10 offense of conviction was still 15 years. And so it's not as  
11 if he got a departure down to a five-year minimum sort of  
12 plea. His mandatory minimum on his count of conviction was 15  
13 years. He accepted responsibility and that's the sentence  
14 that he got.

15 And finally, Charles McMillan, who testified in this  
16 case, also pled to conspiracy to advertise, received credit  
17 for his plea as well as for the cooperation he offered in his  
18 -- as the Court heard, his direct contact with Mr. DeFoggi  
19 that did assist in the identification. And of course, he  
20 assisted at trial.

21 So there's a real meaningful distinction to be drawn  
22 between Mr. DeFoggi's case and the cases of the other  
23 defendants in this matter.

24 I should also just note in terms of McGrath, the  
25 administrator, his sentence was not a rejection of the

1 guidelines wholesale; in fact, far from it. He did receive a  
2 guideline sentence. The sentencing judge in that case, Judge  
3 Bataillon, adjusted his guidelines down based on some  
4 objections to particular guideline provisions.

5 So it was adjusted -- his sentence was adjusted for  
6 cooperation, first of all; for acceptance, and then certain  
7 enhancements were not applied by the trial judge. So it  
8 wasn't as if there was some wholesale rejection again in the  
9 context of another defendant who was being adjudicated for  
10 enterprise as opposed to a possession/receipt sort of  
11 scenario.

12 And just to very briefly address the defendant's  
13 comments, we should be very clear -- and the Court saw this,  
14 of course -- as much as the defendant wants to talk about  
15 other computers in his household that had child pornography  
16 and who they belonged to, one, it's clear he had access to all  
17 of them; two, as the Court will recall, the defendant's  
18 computer was in his hands when law enforcement had to pry it  
19 out of his hands upon executing the search warrant while he  
20 was downloading a child pornography video from a Tor network  
21 child pornography website. There's just no mistaking that he  
22 was the person who is responsible here, much as he wants to, I  
23 think, vaguely shift responsibility onto his adopted son, who,  
24 of course, testified in this case and denied having anything  
25 to do with any child pornography whatsoever.

1           And so I know the Court will certainly consider that  
2           evidence when evaluating the defendant's statements here  
3           today.

4           With that, your Honor, we do believe that a guideline  
5           sentence is warranted here. Consistent with our  
6           recommendations, we would recommend a high end guideline  
7           sentence.

8           Thank you.

9           THE COURT: Thank you, Mr. Becker.

10           Well, as the lawyers know, and no doubt as Mr. DeFoggi  
11           knows, I'm required to consider a number of factors when  
12           imposing a sentence.

13           First, I will decline defense counsel's invitation to  
14           declare the child pornography statutes unconstitutional. I  
15           recognize that Congress from time to time, from year to year,  
16           passes different laws. And sometimes things are made  
17           criminal, sometimes they are made not criminal. And sometimes  
18           penalties are increased, and sometimes they're decreased.

19           And that reflects a changing society and a change in  
20           priorities. And I have respect for the role of Congress in  
21           deciding what is legal and what is not legal and what  
22           penalties for crimes should be.

23           I am not aware of any court that has declared these  
24           offenses and the penalties for the offenses to be cruel and  
25           unusual punishment under the Eighth Amendment of the

1       Constitution, so I will not be the one who does that.

2 I'm required to consider punishment. But frankly, as the  
3 lawyers know, I don't give a lot of weight to punishment  
4 because I don't think it's a particularly useful concept. I  
5 put more weight on the concepts of general deterrence,  
6 specific deterrence, and the need to protect society.

7       While I think that prisons can and many do provide useful  
8       opportunities for rehabilitation, the Supreme Court has said  
9       we are not to send people to prison for the purpose of  
10       rehabilitation. And so I am giving that very little weight in  
11       my calculus.

12 I do recognize the specific characteristics and the  
13 history of Mr. DeFoggi. And I appreciate the fact that he has  
14 reached a stage where he is at midlife or beyond and had no  
15 criminal history when he came into this court.

16 I recognize that he has done many things throughout his  
17 life that were of service to his country. And I don't  
18 diminish those in any way. I recognize the good that he has  
19 done in his life to the extent that that's been brought to my  
20 attention.

21 I am weighing the element of general deterrence. I think  
22 it is important that people realize the lives of children are  
23 destroyed when they are subjected to sexual abuse. And they  
24 are harmed again and again very seriously when their sexual  
25 abuse is placed on the Internet and circulated for others to

1 enjoy.

2           And this particular network involved not just child  
3 erotica, but it involved abuse of children to the most extreme  
4 extent, all the way down to newborn infants being raped and  
5 brutalized. So we would hope that severe penalties would  
6 deter other people from committing similar offenses.

7           I'm also considering specific deterrence; and that is, of  
8 course we want to be sure that Mr. DeFoggi does not engage in  
9 similar conduct in the future.

10           But probably most important is the protection of society  
11 from future criminal activity. And I recognize and I  
12 appreciate the fact that there was no evidence that  
13 Mr. DeFoggi had engaged in hands-on abuse of children.

14           But the jury found, based upon the evidence presented,  
15 beyond a reasonable doubt that Mr. DeFoggi was the individual  
16 using the screen name/computer name or alias fuckchrist and  
17 PTasseater. And that individual is a very dangerous  
18 individual.

19           Mr. DeFoggi is a very intelligent person. And he's a  
20 person with very high levels of computer skills. Perhaps he's  
21 among a handful of people in the country who have such high  
22 levels of computer skills and such knowledge of the Tor  
23 network, also known as The Onion Router. That makes him more  
24 dangerous, frankly.

25           The dialogues that he was involved with and participated

1       in did indicate that he was not just accessing the child  
2       pornography, but he was encouraging others to create child  
3       pornography through the abuse of children.

4           And, of course, he was attempting to meet with the  
5       individual who went by the screen name Toddler Lover to  
6       discuss their mutual fantasies and actually to plan the  
7       abduction, torture, rape and murder of children as young as  
8       infants.

9           So while this may have been fantasy discussion and may  
10       have been an effort on the part of Mr. DeFoggi to connect with  
11       other men who had similar fantasies, it is certainly  
12       information that would give anyone pause as to whether  
13       Mr. DeFoggi should be in a position where he would have the  
14       ability to follow through on those fantasies, especially since  
15       he was taking the additional steps of encouraging others to  
16       create pornography and trying to connect with someone who had  
17       the same goals that he had in acting out on the fantasies.

18           Having said all of that, generally I do sentence somewhat  
19       below the guideline ranges in connection with the child  
20       pornography cases because those guideline ranges are so very,  
21       very high. And I do recognize people do change over the year,  
22       they do change over the decades.

23           And we're in a sentencing range here where the defendant  
24       will be incarcerated for decades, and he will be looking at a  
25       lifetime of supervised release with restrictions on his

1 activities.

2 So I'm supposed to impose a sentence that is sufficient  
3 but not greater than necessary to serve all of the statutory  
4 sentencing factors. And I find that a sentence of 300 months'  
5 incarceration to be followed by lifetime supervised release is  
6 sufficient but not greater than necessary to serve all the  
7 statutory sentencing objectives. That is the sentence that I  
8 impose.

9 I will not impose a fine because the defendant does not  
10 have the ability to pay and is not expected to become able to  
11 pay a fine.

12 I should note that the term of incarceration is  
13 concurrent. So all of the counts, Count I and Counts IV  
14 through VII will run concurrently. The term of 300 months is  
15 on Count I. And on Counts IV through VII, I impose a term of  
16 240 months to run concurrent with the term on Count I.

17 The special assessment will be \$500. That represents  
18 \$100 per each of the five remaining counts.

19 I intend to impose the special conditions of supervised  
20 release set out in the sentencing recommendation. Are there  
21 any objections to those, Mr. Becker?

22 MR. BECKER: Judge, just a note, the statutory  
23 maximum on Counts IV to VII would be 120 months on each count.

24 THE COURT: Oh, my apologies. Okay. Then the  
25 sentencing recommendation is incorrect, is that --

1                   MR. BECKER: I think that's right, Judge.

2                   THE COURT: All right. I assume there is no  
3                   disagreement as to that, Mr. Dornan?

4                   MR. DORNAN: No, your Honor.

5                   THE COURT: All right. We will correct the record --  
6                   thank you, Mr. Becker -- 120 months on Counts IV through VII  
7                   to run concurrent with the 300-month term on Count I.

8                   And so Mr. Becker, do we have the statutory maximum  
9                   incorrect on the sentencing recommendation, too? Because  
10                  perhaps we need to get that corrected for the record.

11                  MR. BECKER: Yeah, on the -- the sentencing  
12                  recommendation lists the statutory -- it lists the statutory  
13                  provision for Counts IV through VII as zero to 20 years. That  
14                  should be zero to 10 years.

15                  THE COURT: All right. We will get that corrected.  
16                  Thank you.

17                  Let me back up. Mr. Becker, no objections to the special  
18                  conditions of supervised release?

19                  MR. BECKER: That's correct, your Honor.

20                  THE COURT: All right.

21                  Mr. Dornan.

22                  MR. DORNAN: We would object to the term of the  
23                  lifetime supervision, Judge.

24                  THE COURT: Okay. But on the special conditions of  
25                  supervised release?

1 MR. DORAN: No, your Honor.

2 THE COURT: All right. The special conditions of  
3 supervised release will be imposed. The standard conditions  
4 will also apply.

5 And I will note that when someone is out on supervised  
6 release and is doing very well and does not appear to any  
7 longer impose any threat to society, it is possible for an  
8 individual to be discharged from supervised release before the  
9 end of the term.

10 I recommend to the Bureau of Prisons that the defendant  
11 receive credit for time served.

12 I recommend that the defendant be placed in a facility  
13 where he can receive sex offender-specific treatment.

14 And of course, Mr. DeFoggi, you have a right to appeal  
15 from your conviction and the sentence that I've imposed. Any  
16 notice of appeal needs to be filed within 14 days of the  
17 filing of the judgment.

18 When we're done with the hearing, the courtroom deputy is  
19 going to show you a form that outlines the right of appeal and  
20 explains how to file a notice of appeal.

21 Please read through the form and then sign it, just  
22 indicating that you've read it. Signing the form is not the  
23 same thing as submitting a notice of appeal.

24 If you have any question about whether you should appeal,  
25 you should discuss the matter with Mr. Dornan. The ultimate

1 decision is up to you.

2 Do you have any question for me about your right of  
3 appeal?

4 THE DEFENDANT: No, your Honor.

5 THE COURT: Okay. Have I neglected anything,  
6 Mr. Becker?

7 MR. BECKER: No, your Honor.

8 THE COURT: Mr. Dornan?

9 MR. DORNAN: Judge, as far as a recommendation,  
10 Mr. DeFoggi would like to be placed as close to the  
11 Washington, D.C. area as possible.

12 THE COURT: Okay. I will recommend that he be given  
13 consideration for placement in a facility as close as possible  
14 to Washington, D.C. so he can be near home and family.

15 And I'll just note that the Butner facility, which is the  
16 one in North Carolina near Raleigh, is the most likely  
17 placement considering the recommendation for sex offender-  
18 specific treatment.

19 But when they decide he's received the maximum benefit of  
20 that treatment, it's possible he might get closer to D.C. But  
21 regardless, it's not too far.

22 MR. DORNAN: Thank you.

23 THE COURT: Very good.

24 The defendant is remanded to the custody of the U.S.  
25 Marshals to be delivered to the Bureau of Prisons.

1 Thank you. We're adjourned.

2 MR. BECKER: Thank you, your Honor.

3 MR. NORRIS: Thank you.

4

5 (Adjourned at 3:38 p.m.)

6

7

8

9 I certify that the foregoing is a correct transcript from

10 the record of proceedings in the above-entitled matter.

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

/s Brenda L. Fauber  
Brenda L. Fauber, RDR, CRR

1-20-15  
Date

## I-N-D-E-X

EXHIBITS: Offered Ruling

307. Evidence Recovery Log 8 8

308. FBI Report 8 8

309. Statement 8 8